No. 91-1682

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

EDWARD J. LEVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court of appeals erred in using a "sufficient nexus" standard for determining whether petitioner's property was forfeitable under 21 U.S.C. 881(a)(7).

2. Whether the civil forfeiture of petitioner's property to the United States, based on its use in the commission of a drug offense for which he was criminally prosecuted by state authorities, violated the Double Jeopardy Clause.

3. Whether the forfeiture of petitioner's property constituted either cruel and unusual punishment or an excessive fine, in violation of the Eighth Amendment.

4. Whether the forfeiture was so excessive as to violate substantive due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 954 F.2d 29. The opinion of the district court (Pet. App. 20a-33a) is reported at 747 F.Supp. 173.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1992. A petition for rehearing was denied on January 21, 1992. The petition for a writ of certiorari was filed on April 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 6, 1988, an undercover police officer, Joseph Emiddio of the Suffolk County Police Department, went with a confidential informant to petitioner's residence, a condominium in Babylon, New York. The purpose of the visit was to purchase cocaine from petitioner. Emiddio asked for one gram of cocaine. Levin entered the kitchen, where Emiddio saw a folded paper packet on the table. When Emiddio asked for an additional one-half gram of cocaine, he saw petitioner retrieve a bowl from a kitchen shelf and remove one of several folded paper packets, which he gave to the officer. Emiddio paid petitioner a total of $150 for the packets, which were later found to contain cocaine. C.A. App. 50; Gov't C.A. Br. 3.

On July 20, 1988, Emiddio arranged to purchase more cocaine from petitioner. Emiddio again went to petitioner's residence to consummate the transaction. Petitioner asked Emiddio if he wanted to buy some marijuana, but Emiddio said he wanted cocaine. After Emiddio paid petitioner $100 for one gram of cocaine, the two discussed future purchases of cocaine. They agreed to use certain code words to indicate the amount Emiddio wanted to buy. C.A. App. 51; Gov't C.A. Br. 3-4. Emiddio made one more small purchase of cocaine from petitioner in petitioner's car near his home. Pet. App. 3a; C.A. App. 52.

As a result of those transactions, Suffolk County police arrested petitioner in October 1988. Petitioner pleaded guilty in New York Supreme Court to a charge of attempted criminal sale of a controlled substance. Pet. App. 3a-4a.

2. On November 10, 1988, the United States instituted an in rem forfeiture action in the United States District Court for the Eastern District of New York against petitioner's condominium, pursuant to 21 U.S.C. 881(a)(7).

On November 14, 1988, the government seized the property pursuant to a warrant. Petitioner filed a claim of ownership and moved to dismiss the complaint. The United States cross-moved for summary judgment of forfeiture. The district court granted the government's motion for summary judgment, ruling that the property was properly subject to forfeiture under 21 U.S.C. 881(a)(7). The court rejected petitioner's arguments that the forfeiture of his property violated due process, the Double Jeopardy Clause, and the Eighth Amendment. Pet. App. 4a, 20a-33a.

3. The court of appeals affirmed. Pet. App. 1a-19a. The court held that the property was subject to forfeiture under 21 U.S.C. 881(a)(7) because a sufficient nexus had been shown between the drug offense and petitioner's property. The court explained that the use of petitioner's residence as the situs for the drug sales "facilitated" the drug activity within the meaning of Section 881(a)(7) because it allowed the drug sales to be accomplished in a private setting. Pet. App. 5a-6a.

The court rejected petitioner's argument that the forfeiture violated the Double Jeopardy Clause. It noted that the criminal prosecution was brought by state authorities, while the civil forfeiture proceeding was brought by federal authorities. The court concluded that even if the civil forfeiture could otherwise be viewed as a second punishment under *United States* v. *Halper*, 490 U.S. 435 (1989), the Double Jeopardy Clause does not bar a second punitive proceeding by a separate sovereign. Pet. App. 11a-17a.

Finally, the court of appeals rejected petitioner's claims that the forfeiture violated substantive due process and the Eighth Amendment's prohibitions against cruel and unusual punishments and excessive fines. The court explained that the forfeiture did not offend due process because petitioner had not done all he reasonably

could do to prevent his property from being used for a drug transaction. Pet. App. 6a-7a. The court also concluded that in light of the serious injury inflicted on society by drug offenses, and the serious treatment of such offenses in federal and state penal law, application of the forfeiture statute was not aberrational, disproportionate, or excessive on the facts of this case. *Id.* at 17a-19a.

ARGUMENT

1. Petitioner contends (Pet. 8-9) that the court of appeals erred in applying a "sufficient nexus" test in determining whether his property was forfeitable under 21 U.S.C. 881(a)(7). He further argues that the Second Circuit's test conflicts with the "substantial connection" standard used by other courts. Pet. 8. That claim does not merit this Court's review. Although courts have used different verbal formulations in describing the reach of Section 881(a)(7), there is no disagreement about the concept underlying that provision, nor is there a conflict in the results of decided cases. Petitioner would fare no better under a "substantial connection" standard than he did under the Second Circuit's "sufficient nexus" standard.

Section 881(a)(7) provides for forfeiture of any real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a felony drug offense. 21 U.S.C. 881(a)(7).[1] In construing that language, some courts have held that a "substantial connection" is required between the property and the criminal activity, see, *e.g.*, *United States* v. *Parcel of Land and Residence at 28 Emery Street*,

[1] The statute provides an exception, not relevant here, that says that "no property shall be forfeited * * * to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. 881(a)(7).

Merrimac, Massachusetts, 914 F.2d 1, 3-4 (1st Cir. 1990); *United States* v. *Premises Known as 3639-2nd St., N.E., Minneapolis, Minnesota*, 869 F.2d 1093, 1096-1097 (8th Cir. 1989); *United States* v. *Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989), while the Second and Seventh Circuits have stated that a "sufficient nexus" is required. Pet. App. 5a; *United States* v. *One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Illinois (916 Douglas Avenue)*, 903 F.2d 490, 492-494 (7th Cir. 1990), cert. denied, 111 S. Ct. 1090 (1991). It is plain from the courts' treatment of specific cases, however, as well as from the discussion of the question by several courts, that there is little if any difference in the standards.

Whether they have recited the "substantial connection" or "sufficient nexus" standards, the courts agree that the broad language of the statute is intended "to reach all real property used to promote the drug trade." *United States* v. *916 Douglas Avenue*, 903 F.2d at 493; accord *United States* v. *Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990); *United States* v. *Premises Known as 3639-2nd St., N.E.*, 869 F.2d at 1096; Pet. App. 5a. The courts also agree that the statute requires some connection that is more than just "incidental or fortuitous," although the use of the property need not be indispensable to the criminal activity.[2] *United States* v. *916 Douglas Avenue*, 903 F.2d at 493-494; *United States* v. *Schifferli*, 895 F.2d at 990; *United States* v. *Premises Known as 3639-2nd St., N.E.*, 869 F.2d at 1096. And they uniformly hold that the statute does not require a "major" or continuing drug operation, but that forfeiture is allowed

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[2] In keeping with that approach, the district court in this case specifically noted that petitioner did not claim that the presence of the drugs in his home was "momentary or merely fortuitous." Pet. App. 23a.

based on even one felony drug violation. *United States* v. *One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110, 113 (4th Cir. 1990); *United States* v. *916 Douglas Avenue*, 903 F.2d at 493-494; *United States* v. *Schifferli*, 895 F.2d at 990-991; *United States* v. *Premises Known as 3639-2nd St., N.E.*, 869 F.2d at 1096-1097; *United States* v. *A Parcel of Land with a Building Located Thereon at 40 Moon Hill Road (40 Moon Hill Road)*, 884 F.2d 41, 45 (1st Cir. 1989).

With respect to the particular issue presented here, the courts have consistently found that when real property has been used as the situs for drug sales, the statute's requirements for forfeiture are satisfied, regardless of whether a "substantial connection" or "sufficient nexus" test is applied.[3] That holding is consistent with the statutory language because the use of the condominium to allow a private transaction "facilitate[s]" the offense. See 21 U.S.C. 881(a)(7). Petitioner's property would therefore be subject to forfeiture regardless of the circuit in which his case arose.

The courts have recognized that this issue implicates only a semantic dispute. In *United States* v. *916 Douglas Avenue*, the Seventh Circuit refused to adopt the "substantial connection standard," and instead (sensibly) derived its test from the statutory language. 903 F.2d at 494. But after describing cases from the Fourth and Eighth Circuits in which the courts used the "substan-

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[3] See *United States* v. *One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d at 113 (substantial connection); *United States* v. *One Parcel of Real Property*, 900 F.2d 470, 475-476 (1st Cir. 1990) (same); *United States* v. *Premises Known as 3639-2nd St., N.E.*, 869 F.2d at 1096 (same); *United States* v. *Santoro*, 866 F.2d at 1542-1543 (same); *United States* v. *Premises Known as 526 Liscum Drive*, 866 F.2d 213, 217 (6th Cir. 1989) (same); *United States* v. *916 Douglas Avenue*, 903 F.2d at 494 (sufficient nexus).

tial connection" standard to find property forfeitable on facts similar to the case before it, the Seventh Circuit remarked that any differences in approaches appeared to be more "semantic rather than practical," and that any distinction was "blurry at best." *Ibid.* Likewise, the court of appeals in this case, though applying a sufficient nexus test, relied on an Eighth Circuit case that upheld a forfeiture on very similar facts by applying the substantial connection test. Pet. App. 5a-6a, citing *United States* v. *Premises Known as 3639-2nd St., N.E., supra.* In sum, whatever variations there are in descriptive shorthands for applying the forfeiture rule of Section 881(a)(7), there is no conflict in results; accordingly, this Court's review is not warranted.

2. Petitioner also contends (Pet. 10-12) that the forfeiture of his residence violated the Double Jeopardy Clause of the Fifth Amendment, because it constituted a second punishment for the same offense. As the court of appeals correctly held, the dual sovereignty doctrine forecloses that claim.

The court of appeals recognized that since this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989), some civil penalties may, in rare circumstances, be found to constitute punishment within the meaning of the Double Jeopardy Clause. Pet. App. 7a-15a. The court of appeals determined, however, that that issue is not presented in this case because "[e]ven assuming that the forfeiture is a criminal penalty, the Double Jeopardy Clause prohibits two criminal punishments for the same offense only when they are sought by the same sovereign government." *Id.* at 16a; see *Heath* v. *Alabama*, 474 U.S. 82 (1985). In this case, petitioner was prosecuted by state authorities, and the federal government brought the subsequent forfeiture action. Accordingly, the Double Jeopardy Clause has no application.

Petitioner insists that this case falls into an exception to the dual sovereignty doctrine because the federal government was purportedly acting as the "tool" of state authorities in seeking the forfeiture. See *Bartkus* v. *Illinois*, 359 U.S. 121, 123-124 (1959). The court of appeals correctly rejected that contention. That exception to the dual sovereignty doctrine "is not triggered simply by cooperation between the two authorities." Pet. App. 16a. Petitioner, however, advanced no support for his claim that federal authorities acted as the tool of the state government other than the fact that the Suffolk County Police Department will receive a portion of the proceeds of the federal forfeiture action. The court of appeals noted that such a distribution is authorized by the statute (see 21 U.S.C. 881(e)(1)(A)), and that the sharing of proceeds provides no basis for a finding that the state prosecuting authorities so controlled the actions of federal officials that the latter "retained little or no independent volition." Pet. App. 16a-17a. See *United States* v. *Jordan*, 870 F.2d 1310, 1312-1313 (7th Cir.), cert. denied, 493 U.S. 831 (1989); *United States* v. *Aboumoussallem*, 726 F.2d 906, 909-910 & n.3 (2d Cir. 1984); *United States* v. *Russotti*, 717 F.2d 27, 31 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984).

3. Petitioner claims (Pet. 12-15) that the forfeiture of his property violates the Cruel and Unusual Punishment Clause or the Excessive Fines Clause of the Eighth Amendment. That contention is without merit.

As an initial matter, because civil forfeiture statutes have long been considered inherently remedial in purpose, see *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-366 (1984); *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 237 (1972), it is doubtful that Eighth Amendment protections even apply in this context. The Eighth Amendment is designed to regulate punishment meted out as the re-

sult of a criminal conviction. *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) ("Given that the Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments."); *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977) ("the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government").[4] The weight of authority from the courts of appeals is that the forfeiture statute at issue in this case, 21 U.S.C. 881, is a civil, remedial provision, and not punitive, and that the protections of the Eighth Amendment therefore do not apply.[5] Petitioner's reliance (Pet. 14-15) on the Ninth Circuit's analysis in *United States* v. *Busher*, 817

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[4] The Court stated in *Browning-Ferris* that "our opinion in *Halper* implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns," 492 U.S. at 275 n.21, but the Court had no occasion to decide that issue, and still less did it touch on the distinct question of whether the Eighth Amendment applies to the ancient remedial device of civil forfeiture actions.

[5] See *United States* v. *Certain Real Property Commonly Known as 6250 Ledge Road, Egg Harbor, WI*, 943 F.2d 721, 727 (7th Cir. 1991); *United States* v. *Real Property & Residence at 3097 S.W. 111th Avenue*, 921 F.2d 1551, 1557 (11th Cir. 1991); *United States* v. *One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Pa.*, 898 F.2d 396, 400-401 (3d Cir. 1990); *United States* v. *Tax Lot 1500*, 861 F.2d 232, 233-235 (9th Cir. 1988), cert. denied, 493 U.S. 594 (1989); *United States* v. *40 Moon Hill Road*, 884 F.2d at 44-45; *United States* v. *Santoro*, 866 F.2d at 1543-1544; cf. *United States* v. *D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 540-545 (5th Cir. 1987) (Section 881 is a civil, remedial provision and not subject to Ex Post Facto Clause), cert. denied, 485 U.S. 976 (1988); *United States* v. *McCaslin*, 959 F.2d 786, 788 (9th Cir. 1992) (civil forfeiture statutes are inherently remedial and therefore do not implicate the Double Jeopardy Clause); *United States* v. *40 Moon Hill Road*, 884 F.2d at 43-44 (same).

F.2d 1409, 1415 (1987), is misplaced because that case involved a *criminal* forfeiture provision (21 U.S.C. 853), not the civil forfeiture statute applied here.

Even assuming that the forfeiture of petitioner's property is subject to Eighth Amendment analysis, the court of appeals correctly determined that it is not grossly out of proportion to the crime committed. Petitioner sold cocaine out of his condominium in two transactions that exposed him to punishment for federal felonies. The value of petitioner's interest in the condominium was approximately $68,000. Pet. App. 3a. Even if the forfeiture is treated as punishment, it is not excessive.

Petitioner asserts (Pet. 13-14) that the court of appeals conducted a faulty Eighth Amendment analysis, failing to take into account the particular factors involved in his offense that might bear on a proportionality claim. The court of appeals considered all of the factors identified in *Solem* v. *Helm*, 463 U.S. 277 (1983), specifically reviewing (1) the gravity of the offense, (2) the amount of the forfeiture here compared to possible criminal penalties for the same offense under federal law, and (3) the possible penalties available in other jurisdictions such as New York, Vermont, and Connecticut. The court concluded that, even if considered a punishment, the forfeiture in this case was not so extreme that it violates the Eighth Amendment. Pet. App. 17a-19a. The correctness of that conclusion does not warrant this Court's review. Cf. *Harmelin* v. *Michigan*, 111 S. Ct. 2680 (1991) (mandatory life sentence without parole for possession of 672 grams of cocaine did not violate the Eighth Amendment).

4. Finally, petitioner contends (Pet. 15-18) that the forfeiture in this case is excessive and disproportionate in violation of his substantive due process rights. He does not take issue with the court of appeals' conclusion that he failed to take reasonable steps to see that his

property was not used illegally. See Pet. App. 6a-7a, citing *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-690 (1974) (upholding forfeiture of vessel where lessees possessed one marijuana cigarette and owner did not do all it reasonably could to avoid that unlawful use). Rather, he claims that the amount of the forfeiture by itself is so extreme as to violate the Due Process Clause. That claim is in error.

The role of substantive due process is an extremely narrow one, *Collins* v. *City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992), particularly in the context of claims that a sanction is unconstitutionally disproportionate to the violation it seeks to remedy, see *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1046 (1991). Petitioner's claim must be judged in light of those principles. He claims that the forfeiture of his condominium was grossly disproportionate to the wrong, and that the Due Process Clause prohibits use of civil cases for purposes of punishment. Petitioner errs, however, in stating that it is impermissible to impose punishment in a civil case, see *Halper*, 490 U.S. at 447 ("It is commonly understood that civil proceedings may advance punitive as well as remedial goals."); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 550 (1943), and he provides no reason for concluding that the forfeiture here rises to the level of being "wholly disproportioned to the offense and obviously unreasonable." Pet. 16, quoting *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63, 66-67 (1919).

The same factors that led the court of appeals to conclude that the forfeiture is not excessive under the Eighth Amendment, Pet. App. 29a-33a, also apply here. In light of the possible criminal penalties that would apply, the nature of the underlying drug distribution crimes petitioner committed, and the interests of the government in compensating for the costs of prosecution and other enforcement costs, the amount of the

forfeiture was not so disproportionate as to offend due process. As the court of appeals stated in rejecting the counterpart Excessive Fines claim, "wherever such a [constitutional] line could be drawn, this forfeiture would be proper." *Id.* at 19a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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